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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN B. TAYLOR, Warden,
Staunton Correctional Center,

Petitioner,

vs.

WILLIAM EVANS-SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED

1. Are more specific guidelines for the application of *Jackson* v. *Virginia* needed to prevent idiosyncratic application of that rule on federal habeas corpus?

2. Does a federal court improperly create a "new rule" on federal habeas corpus when it grants habeas relief on the ground that subsidiary inferences have not *individually* been proven beyond a reasonable doubt?

3. Should federal district courts be given back the discretion, which they had under *Salinger* v. *Loisel* and *Ex parte Hawk* before 1953, to deny a habeas petition on the ground that the issues had already been fully litigated in state court?

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Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that (1) the federal courts need more specific guidance in applying *Jackson* v. *Virginia*; (2) the prosecution may meet its burden of proof by building up subsidiary inferences, no one of which by itself constitutes proof beyond a reasonable doubt; (3) the Court of Appeals' decision to the contrary is an impermissible "new rule"; and (4) district courts ought to be given back their pre-1953 discretion to deny relitigation of fully litigated issues.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation

relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Court of Appeals' misapplication of *Jackson* v. *Virginia* is contrary to the interests CJLF was formed to advance. Error in applying this rule is even worse than error in granting a new trial, since a wrong *Jackson* ruling frees the criminal forever. CJLF therefore has an interest in the case.

For the foregoing reasons, *amicus* requests leave to file its brief.

August, 1994

Respectfully submitted,

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TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Table of authorities vi

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 3

I

The federal courts need further guidance in applying *Jackson* v. *Virginia* 3

II

"A brick is not a wall"; the assertion it must be is a new rule, and a wrong rule 7

III

This Court should consider restoring *Salinger/Hawk* discretion to the federal district courts 9

Conclusion 15

TABLE OF AUTHORITIES

Cases

Adamson v. Ricketts, 865 F. 2d 1011 (CA9 1988) 14

Alabama v. Smith, 490 U. S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) 14

Beam v. Paskett, 3 F. 3d 1301 (CA9 1993) 14

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 13

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 9

California v. Ramos, 463 U. S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983) 15

Darr v. Burford, 339 U. S. 200, 94 L. Ed. 761, 70 S. Ct. 587 (1950) 12, 13

Dawson v. Delaware, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992) 4

Denton v. Hernandez, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992) 10

Estelle v. McGuire, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) 5, 6

Evans-Smith v. Commonwealth, 361 S. E. 2d 436 (Va. App. 1987) 1

Ex parte Cuddy, 40 F. 62 (C. C. S. D. Cal. 1889) 11

Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448 (1944) 12

Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868, 6 S. Ct. 734 (1886) 13

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963) 12

Gilmore v. Taylor, 124 L. Ed. 2d 306,
113 S. Ct. 2112 (1993) 8

Hamilton v. Vasquez, 17 F. 3d 1149 (CA9 1994) 15

Jackson v. Virginia, 443 U. S. 307 , 61 L. Ed. 2d 560,
99 S. Ct. 2781 (1979) 3, 7

Lewis v. Adamson, 497 U. S. 1031, 111 L. Ed. 2d 795,
110 S. Ct. 3287 (1990) 14

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 14

Lockhart v. Fretwell, 122 L. Ed. 2d 180,
113 S. Ct. 838 (1993) 8

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 9

McGuire v. Estelle, 902 F. 2d 749 (CA9 1990) 5

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543,
43 S. Ct. 265 (1923) 10, 12

People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) . . . 4

Pierce v. Underwood, 487 U. S. 552, 101 L. Ed. 2d 490,
108 S. Ct. 2541 (1988) 10

Riggins v. Nevada, 118 L. Ed. 2d 479,
112 S. Ct. 1810 (1992) 10

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 14

Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989,
44 S. Ct. 519 (1924) 11, 12, 13

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 7

Victor v. Nebraska, 127 L. Ed. 2d 583,
114 S. Ct. 1239 (1994) 4

Wade v. Mayo, 334 U. S. 672, 92 L. Ed. 1647,
68 S. Ct. 1270 (1948) 12

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511,
110 S. Ct. 3047 (1990) 14

West v. Wright, 931 F. 2d 262 (CA4 1991) 4

Withrow v. Williams, 123 L. Ed. 2d 407,
113 S. Ct. 1745 (1993) 14

Wright v. West, 120 L. Ed. 2d 225,
112 S. Ct. 2482 (1992) 3, 4, 7, 9, 10

Treatise

C. McCormick, Evidence (1st ed. 1954) 7

Miscellaneous

139 Cong. Rec. S15818 (1993) 14

140 Cong. Rec. H2272 (1994) 14

140 Cong. Rec. H2420-2421 (1994) 14

J. Barlett, Familiar Quotations (15th ed. 1980) 8

U. S. Dept. of Justice, Bureau of Justice Statistics,
Sourcebook of Criminal Justice Statistics 1992 (1993) . . . 6

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SUMMARY OF FACTS AND CASE

The facts are set forth in detail in four opinions in the Appendix to the Petition for Writ of Certiorari 3A-17A, A32-A43, A71, A79-A80. Briefly, Barbara Evans-Smith was murdered in the early morning of April 15, 1985. App. to Pet. for Cert. 4A. At respondent's first trial for the murder, the trial court admitted evidence of Mrs. Evans-Smith's statements to several people regarding the deterioration of her marriage and that her husband, respondent William Evans-Smith, was hostile and had previously tried to kill her. His conviction was reversed on appeal on the ground, among others, that this was inadmissible hearsay. *Evans-Smith* v. *Commonwealth*, 361 S. E. 2d 436, 439-445, 449 (Va. App. 1987).

Retrial therefore proceeded without evidence of motive. The prosecution's case consisted of a crime scene that was poorly staged to look like a robbery and rape, the lack of any sign of forced entry, the time of death and defendant's schedule,

defendant's demeanor and unusual questions when informed of the death by investigators, defendant's inconsistent statements, his attempt to get a co-worker to change his story about defendant's arrival time at work, a neighbor's discovery in a field two weeks later of a jewelry box reported stolen by defendant but not looking like it had been in a field for two weeks, and other evidence. App. to Pet. for Cert. A35-A43.

The trial court judge denied a motion to set aside the verdict. He reviewed the evidence under the state standard that a circumstantial case "must exclude every reasonable theory of innocence." *Id.*, at A32. "*Having heard and seen all the evidence*, I am of the opinion that there was sufficient evidence presented for the jury to find under the instructions given that the defendant did murder Barbara Evans-Smith." *Id.*, at A43 (emphasis added).

The Virginia Court of Appeals reviewed the evidence under the same standard and agreed. *Id.*, at A71. The Virginia Supreme Court also agreed and denied relief. *Id.*, at A76.

On federal habeas corpus, the District Court reviewed the sufficiency of the evidence *de novo* under the more generous (to the prosecution) constitutional standard and found it sufficient. *Id.*, at A79-A80. The District Court also denied a certificate of probable cause. Pet. for Cert. 11.

The Court of Appeals for the Fourth Circuit, disagreeing with the unanimous view of all the prior courts, granted habeas corpus relief. App. to Pet. for Cert. 29A.

SUMMARY OF ARGUMENT

This case presents issues which go far beyond the facts of the individual case. It involves a repeated failure of the courts of appeals to observe proper limits on habeas jurisdiction. First, the repeated misuse of *Jackson* v. *Virginia* indicates a need for this Court to lay down some more specific guidelines on how to apply the general rule of that case to commonly occurring factual situations. Without such guidance, federal courts are simply second-guessing the jury, as was done in this case.

Second, the approach to evidence taken by the Court of Appeals in this case was a radical departure from established principles of the law of evidence. The new, dangerous, and wrong rule thus created is contrary to the rule of *Teague* v. *Lane* and threatens much mischief.

Finally, the district judge's denial of a certificate of probable cause strongly implies that he did not believe this was the kind of case where *de novo* review is needed. To limit the misuse of the Great Writ as an instrument of injustice, rather than justice, this Court should consider restoring to the district courts their discretion to decline to reopen fully litigated questions, a discretion they clearly had prior to 1953.

ARGUMENT

I. The federal courts need further guidance in applying *Jackson* v. *Virginia*.

In *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), this Court unanimously reversed a decision of a Fourth Circuit panel, including two of the three judges in the present case, for misapplication of *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Though the *West* Court agreed on little else, the stunning wrongness of the lower court's *Jackson* analysis was evident to all. See *West*, 120 L. Ed. 2d, at 241 (opinion of Thomas, J.) ("clear"); *id.*, at 242 (opinion of White, J.) ("amply demonstrates"); *ibid.* (opinion of O'Connor, J.); *id.*, at 250 (opinion of Kennedy, J.); *ibid.* (opinion of Souter, J.) ("could not disagree").[1]

Oblivious to the rebuke, the Court of Appeals in the present case winds up its *Jackson* analysis with this jaw-dropping statement: "As in *West*, the instant case requires not only the reversal of a federal district court, but also of the state trial and appellate courts." App. to Pet. for Cert. 28A. In other words, the court below relied on its own reversed *West* opinion *for the very point on which it was reversed*. The *West* case did *not* require reversal of the state courts and the federal district court.

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1. The corresponding pages of 112 S. Ct. are 2493 and 2500.

The Court of Appeals was wrong in holding that it did, and it was reversed by this Court on that point.

Something is gravely wrong here. The wording of the *Jackson* opinion has proved insufficient to prevent idiosyncratic application. In *West*, Virginia and *amicus* asked this Court to create a standard of deference to reasonable state court resolution of mixed questions of law and fact. See *West*, *supra*, 120 L. Ed. 2d, at 233, 112 S. Ct., at 2486. The result was a badly splintered opinion. Absent a deferential standard, there is a crying need to put some meat on *Jackson*'s bones.

It is bad enough when the murderer goes free because the constable blunders. See *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.). It is far worse for a murderer to go free when the state is right, but the federal Court of Appeals blunders.

Two errors are apparent in both the present and the earlier *West* opinion. Both involve commonly occurring evidentiary situations, and clear guideposts would establish greater uniformity and fairness in the application of *Jackson*.

First, the Court of Appeals has once again failed to acknowledge the powerful implications of a defendant's duplicity. In *West* v. *Wright*, 931 F. 2d 262, 269-270 (1991), the Fourth Circuit held that a false explanation of possession of stolen goods, if not "inherently implausible," could not "fairly be treated as positive evidence of guilt" of theft. This was error. "[I]f the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, *supra*, 120 L. Ed. 2d, at 241, 112 S. Ct., at 2492.

The jury's job is to draw inferences of probability, see *Victor* v. *Nebraska*, 127 L. Ed. 2d 583, 600, 114 S. Ct. 1239, 1251 (1994), and "[j]urors do not leave their knowledge of the world behind when they enter a courtroom." *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 321, 112 S. Ct. 1093, 1101 (1992) (Thomas, J., dissenting). We all know that people who lie are generally trying to cover something up. Where a misdeed has been committed and no other motive for lying is discernable, experience tells us that people who lie are usually trying to hide their own complicity in the misdeed. Whether the misdeed be a

broken vase, the burglary of a political opponent's office, or a murder, covering up is a powerful indicator of guilt. The trial judge understood this. App. to Pet. for Cert. A37.

Footnote 24 of the Court of Appeals' opinion repeats the glaring logical error in *West*. The court brushes off defendant's contradictory statements as "inconsequential" based only on the probative value of the content of the statements. *Id.*, at 24A. But some of these statements must certainly be false, and the jury may justifiably infer that they were deliberate lies. Duplicity itself can have the weight of an anvil, even if the substance of the lie is only a feather.

The Court of Appeals' second error is a failure to heed *Jackson*'s mandate to presume that all arguable inferences are resolved in favor of the prosecution, see 443 U. S., at 326, even while paying lip-service to that requirement. In footnote 25, the court says this about defendant's attempt to get a colleague to change his story:

> "Once again, what is required here, in order to find for the Commonwealth, is a kind of double inference. We must infer that the content of Evans-Smith's phone conversation with someone in New Mexico was meant to make his colleague's story consistent with his own, and then we must infer that the reason he desired consistency was to create an alibi since he had committed the murder. However, the first inference might lead only to the conclusion that *whether or not* he had committed the murder, it would be in Evans-Smith's interest to present a consistent story to the police. After all, the recipient of the phone call testified that Evans-Smith simply said that it would be 'nice' if the two of them had the same story. He did not appear angry, merely upset." App. to Pet. for Cert. 25A (emphasis in original).

Nothing in *Jackson* exempts double inferences from its mandatory presumption. So long as both inferences are plausible, as they are in this case, *Jackson* requires them to be resolved in favor of the prosecution. The fact that an inference *might* lead to a contrary conclusion is simply irrelevant.

A third error in the present opinion echoes the misconception of evidence in *McGuire* v. *Estelle*, 902 F. 2d 749, 753 (CA9 1990), rev'd *sub nom. Estelle* v. *McGuire*, 116 L. Ed. 2d 385,

112 S. Ct. 475 (1991). In that case, the Ninth Circuit had held irrelevant, and hence inadmissible, evidence which served to narrow the class of suspects, although not limited to the defendant. That determination was wrong in *McGuire*, and the Fourth Circuit's dismissal of similarly probative evidence is equally wrong here.

In *McGuire*, the prosecution introduced evidence of "battered child syndrome," which indicates that the child died as the result of a pattern of abuse. See *id.*, 116 L. Ed. 2d, at 395, 112 S. Ct., at 479. Among other objections, McGuire complained that there was no evidence directly linking him to the prior injuries. *Id.*, 116 L. Ed. 2d, at 399, 112 S. Ct., at 483. Nonetheless, the evidence was not only admissible, but powerfully probative. "The proof of battered child syndrome itself narrowed the group of possible perpetrators to McGuire and his wife . . . ." *Id.*, 116 L. Ed. 2d, at 400, 112 S. Ct., at 483. The Court was unanimous on this point. See *id.*, 116 L. Ed. 2d, at 403, 112 S. Ct., at 486 (O'Connor, J., concurring in part and dissenting in part) (agreeing that a properly instructed jury could consider the evidence for this purpose, and that the evidence was sufficient).

The present case involves a different question of law, but the logical error is similar. The Court of Appeals fails to appreciate the importance of evidence which narrows the suspect class. The inference that the crime was not a felony murder (*i.e.*, murder in the course of a rape, robbery, and burglary), but had been staged to look like one, narrows the suspect class to persons who had some *other* motive. Among homicides for which the circumstances are known, arguments and felony murder are far and away the most common circumstances. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1992, p. 386 (1993). If felony murder is eliminated, the probability that the murder arose from an argument is greatly enhanced. With whom is a married woman, with no children at home, likely to argue at six in the morning?

Yet the Court of Appeals brushes off this important evidence. "The prosecution urges us to believe that the crime scene was staged," the court says. App. to Pet. for Cert. 22A, n. 20. No, the *habeas court* need not believe this inference; *Jackson* requires that this eminently arguable inference be presumed to

have been resolved by the *jury* in the prosecution's favor. What the judges of the Court of Appeals believe or do not believe is irrelevant. They are not on the jury. The staging evidence has powerful probative value, far more than the Court of Appeals ascribed to it.

Even worse, though, the Court of Appeals goes on to hold this one piece of evidence to a far higher standard than it is required to bear. There lies the most serious error of all.

II. "A brick is not a wall"; the assertion it must be is a new rule, and a wrong rule.

After discounting the evidence that the crime scene was staged to look like a felony murder, the Court of Appeals went on to say this:

> "Even if a rational fact-finder would accept this theory, the Commonwealth's bald assertion that no one but Evans-Smith would have staged the crime scene simply is insufficient ground for us to conclude that a rational fact-finder could connect Evans-Smith beyond a reasonable doubt to the killing." App. to Pet. for Cert. 22A, n. 20.

This statement reveals a grave misconception of the nature of evidence. A single piece of evidence, or a single inference from several pieces of evidence, is not required to bear *by itself* the heavy burden of proof beyond a reasonable doubt. "A brick is not a wall." C. McCormick, Evidence § 152, p. 317 (1st ed. 1954). This is an old rule.

The Court of Appeals approaches the prosecution's case, chisels off one brick, declares it is not a wall, and throws it away. After repeating this exercise several times, see, *e.g.*, App. to Pet. for Cert. 20A, n. 16; *id.*, at 21A, n. 18; *id.*, at 25A, n. 25, the court finds there is no wall and renders judgment for the habeas petitioner. *Id.*, at 29A. *Jackson* v. *Virginia*, 443 U. S. 307 (1979) does not dictate this mode of proceeding, and hence the court has created a new rule. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality); see also *Wright* v. *West*, 120 L. Ed. 2d 225, 254, 112 S. Ct. 2482, 2503 (1992) (opinion of Souter, J.)

As the Commonwealth's petition correctly notes, this Court's cases after finality of the present judgment further reinforce their position. Pet. for Cert. 21, n. 7. *Amicus* will not add to this argument, as no addition is needed, but will only point out why subsequent authority is appropriate in a *Teague* argument.

Most judgments are final when they are final. Cf. Y. Berra, quoted in J. Bartlett, Familiar Quotations 903 (15th ed. 1980). Habeas corpus is an extraordinary exception to this rule, permitting relitigation of issues already resolved by a final judgment of a court of competent jurisdiction. Defendants who prevail in state court are fully protected by the Double Jeopardy Clause; the state can never collaterally attack adverse final judgments. Only the state needs to defend against collateral attacks, and only the state needs limitations on collateral attack. Thus, permitting the state to invoke post-finality authority, while the defendant cannot, is not an asymmetry favoring the state; it is merely a modest limitation on an asymmetry which heavily favors the defendant.

The *Teague* nonretroactivity rule is a partial protection for final judgments. The limitation therefore only applies to subsequent authority used to attack the judgment, and not to subsequent authority used to support the judgment. Where the reason for the rule ends, the rule ends. *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993). "Although [the subsequent cases were] decided after respondent's conviction and sentence became final, [they do] not work a change in the law favoring criminal defendants, and therefore may be considered in our *Teague* analysis." *Gilmore* v. *Taylor*, 124 L. Ed. 2d 306, 318, 113 S. Ct. 2112, 2117 (1993); *id.*, 124 L. Ed. 2d, at 322, 113 S. Ct., at 2121 (O'Connor, J., concurring in the judgment).

Not only was the Court of Appeals' examine-and-discard approach not dictated by precedent existing in 1990, it is not dictated by precedent existing at the present time. This approach is a new rule, and it threatens to tear down circumstantial evidence cases throughout the circuit, if not throughout the nation. Such a rule would reward the worst of murderers: those cool and clever enough to avoid or destroy any direct evidence of their guilt. The issue is broad enough and important enough to warrant this Court's attention.

III. This Court should consider restoring *Salinger/Hawk* discretion to the federal district courts.

Although not raised by the Commonwealth, there is another, deeply disturbing aspect to this case which the Court may wish to consider.[2] Of the many jurists to review the sufficiency of the evidence in this case, there is one who, beyond question, has the best vantage point: the trial judge. His careful, detailed analysis of the evidence is appended to the Petition at pages A32-A43. All that has followed has been Monday morning quarterbacking.

Under similar circumstances, a proposal that the federal courts *must* defer to the state courts badly divided this Court in *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992). The district judge in the present case felt the opposite injunction. "The burden is on the Federal Court in this situation to review the matter de novo . . . ." App. to Pet. for Cert. A79. Between these two opposing "musts" lies the discretionary "may." Discretion on this point was once the law of the land, and *amicus* respectfully suggests that this Court consider whether it should be again.

Federal habeas review is an undoubtedly important safeguard when the state processes break down, see, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923), but there was no breakdown here. Instead, the trial judge reviewed the evidence under a standard more favorable to the defendant than federal law requires. Compare App. to Pet. for Cert. A32 (state standard) with *id.*, at A79 (federal standard). *De novo* review on habeas corpus is sometimes justified on the notion that state courts are institutionally hostile to federal rights. See, *e.g.*, *Butler* v. *McKellar*, 494 U. S. 407, 427, n. 8 (1990) (Brennan, J., dissenting). Even suspending our disbelief in the premise, it is difficult to see how this justification applies to courts which have voluntarily created a *higher* state standard than federal law requires. If the Virginia courts were hostile to their own standard, they could simply overrule it.

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2. The Court has the discretion to consider issues raised by *amici*. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (overruling *Wolf* v. *Colorado* raised only by *amicus*).

In this case, then, the federal Court of Appeals has no higher claim to fidelity to the controlling standard than the four courts that previously considered and rejected Evans-Smith's claim. The Court of Appeals' perspective on the facts is no better than three of those courts' perspectives, and it is decidedly inferior to the trial court's view.[3] Why, then, should its contrary conclusion prevail?

The Court of Appeals' *de novo* application of *Jackson* is premised on the District Court's *de novo* application of the same rule. This Court succinctly stated the standards of review in *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988):

> "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."

Thus, a denial of habeas corpus because the district judge has reconsidered the underlying legal question, and agrees with the state courts, is reviewed *de novo*. On the other hand, if the district judge had the discretion to review the state court proceedings, to decide that they have provided a fair hearing and reached a satisfactory result, and to deny relitigation on that basis, this decision would be reviewable only for an abuse of discretion. Cf. *Denton* v. *Hernandez*, 118 L. Ed. 2d 340, 350, 112 S. Ct. 1728, 1734 (1992) (dismissal of frivolous claim discretionary, reviewed only for abuse).

In *West*, Justice O'Connor relied on a series of pre-1953 cases. 120 L. Ed. 2d, at 243, 112 S. Ct., at 2494. These cases do indeed stand for the proposition for which Justice O'Connor cites them, that a prior denial of relief does not stand as a strict *res judicata* bar to habeas relief. However, when the question

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3. For example, a significant piece of evidence was defendant's lack of tears, raising an inference that his grief was feigned. See Pet. for Cert. 8-9. In this context, the factfinder may legitimately consider his demeanor at trial. See *Riggins* v. *Nevada*, 118 L. Ed. 2d 479, 494, 112 S. Ct. 1810, 1819 (1992) (Kennedy, J., concurring). What was his demeanor? The trial judge knew. We do not, and the Court of Appeals did not.

shifts from strict prohibition to a discretionary refusal to relitigate, this same line of cases points in the other direction.

Salinger v. *Loisel*, 265 U. S. 224 (1924) is the cornerstone case. Salinger was a federal prisoner who fought a protracted battle against being removed to South Dakota, where he had been indicted for mail fraud. *Id.*, at 225-226. He fled to New York, was arrested there, and sought habeas relief, which was denied. He then posted bail, fled to New Orleans, was surrendered by his surety there, and again sought habeas relief. *Id.*, at 226-227.

Marshall Loisel asserted that the New York denial was *res judicata*. The Court said it was "unable to go so far." *Id.*, at 230. *Salinger* is thus correctly citable for the proposition that a prior denial of relief is not *res judicata*. See *West*, 120 L. Ed. 2d, at 243, 112 S. Ct., at 2494. But the opinion says much more. *Salinger* construed the statutory language "to dispose of the party as law and justice may require" in this way:

> "A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, *and even given controlling weight*, are (a) the existence of another remedy, such as a *right in ordinary course to an appellate review* in the criminal case, and (b) a prior refusal to discharge on a like application." 265 U. S., at 231 (emphasis added).

This statement is followed by a long list of cases, involving both state and federal prisoners, *ibid.*, indicating that the Court saw no difference in the two on the point under discussion. The Court then quoted an opinion by Justice Field as Circuit Justice: "The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." *Id.*, at 231-232 (quoting *Ex parte Cuddy*, 40 F. 62, 66 (C. C. S. D. Cal. 1889)).

"Had the District Court disposed of the later applications on that ground [prior adjudication], its discretion would have been well exercised, and we should sustain its action without saying

more." *Id.*, at 232. The Court then proceeded to the merits because the District Court had not exercised that discretion. *Ibid.*

Salinger was clear enough on its face that its rule applied equally to state and federal adjudications. If there had been any doubts, however, they were eliminated in *Ex parte Hawk*, 321 U. S. 114 (1944), a unanimous *per curiam* opinion. "Where the state courts have considered and adjudicated the merits of his contentions . . . a federal court *will not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (citing *Salinger*, *supra*, 265 U. S., at 230-232 (emphasis added)). The *Hawk* Court then went on to note that if the state provided no remedy, or circumstances rendered it inadequate (citing *Moore* v. *Dempsey*, 261 U. S. 86 (1923)), the federal court should proceed. *Hawk*, 321 U. S., at 118.

Justice O'Connor's *West* opinion also relies on *Darr* v. *Burford*, 339 U. S. 200, 214 (1950). *Darr* reaffirms the discretionary rule of *Salinger* and *Hawk*. The *Darr* Court was divided on whether a defendant was required to petition for a writ of certiorari from this Court before filing his federal habeas petition. That question vexed the Court for some time. See *Ex parte Hawk*, *supra*, 321 U. S., 116-117 (yes); *Wade* v. *Mayo*, 334 U. S. 672, 680-681 (1948) (not if denial was likely); *Darr*, 339 U. S., at 217 (yes); *Fay* v. *Noia*, 372 U. S. 391, 435 (1963) (no, overruling *Darr* on this point).

No such division attended the question of whether a federal habeas court had discretion to deny a petition on the ground the questions had been adjudicated in the state courts. Both opinions reaffirmed the *Salinger/Hawk* rule.

> "Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.[40] On that application, the court may require a showing of the record and action on prior applications, and *may decline to examine further into the merits because they have already been decided against the petitioner.*[41]

"40. *Ex parte Royall*, 117 U. S. 241.

"41. *Salinger* v. *Loisel* . . . ."

Darr, 339 U. S., at 215 (emphasis added). Significantly, both cases cited involved disputes of pure law on undisputed facts. See *Ex parte Royall*, 117 U. S. 241, 242-243 (1886) (act admitted, constitutionality of law only issue); *Salinger*, 265 U. S., at 233-234 (construction of mail fraud statute).

The dissent also acknowledged that *Salinger* held that "prior denials carry considerable weight in disposing of a later application . . . ." *Id.*, at 224 (Frankfurter, J., dissenting); see also *id.*, at 225 ("discretionary aspect of habeas corpus").

What happened to the discretion so clearly and firmly vested in the district courts as of 1950? *Salinger* and *Hawk* have not been overruled, and *Darr* has not been overruled on this point. No convincing reason has been put forth why federal courts must relitigate *every* question of federal constitutional law in *every* state criminal case regardless of the care and thoroughness of the state court's consideration. Yet the discretion seems to have vanished in a puff of blue smoke in 1953.

Amicus has previously briefed to this Court our reasons for doubting whether *Brown* v. *Allen*, 344 U. S. 443 (1953) really does stand for the proposition of mandatory *de novo* relitigation of every question of federal constitutional law. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, O. T. 1991, No. 91-542 ("CJLF *West* Brief"), pp. 14-16. We will not repeat these arguments here. However, the audacity of Justice Frankfurter's assertions in his concurring opinion are worth noting.

The crux of the present issue lies in Justice Frankfurter's statement on page 513: "It is inadmissible to deny the writ merely because a State court has passed on a Federal constitutional issue." Justice Frankfurter cites no precedent for this remarkable statement, for a very good reason. The precedents are clearly and flatly contrary. *Salinger* says the precise opposite in words clear beyond dispute. *Hawk* and *Darr* apply the *Salinger* rule unequivocally to prior state adjudications, and even Justice Frankfurter's dissent in *Darr* grudgingly acknowledges the very discretion he denies in *Brown*.

Does the mere passage of time entitle *Brown* to more respect *as* precedent than it gave *to* precedent? Quite the

contrary. *De novo* review may well have been a necessary evil in racial discrimination cases from the South in 1953, but the changes in the nation since then have rendered relitigation far less necessary and much more evil. See CJLF *West* Brief 21-24.

Congressional supporters of unlimited relitigation argued to this Court in *West* that the failure in Congress of proposals to overrule *Brown* constitutes Congressional endorsement. Brief for Senator Biden and Representative Edwards as *Amici Curiae* in *Wright* v. *West*, O. T. 1991, No. 91-542, pp. 10-16. Since that time, Congress has rejected attempts to codify *Brown*. See 139 Cong. Rec. S15818 (1993) (habeas removed from Biden crime bill); 140 Cong. Rec. H2272 (1994) (§ 807 of H. R. 4092); *id.*, at H2420-2421 (1994) (vote 270-159 to remove). Whatever weight failed bills may have, if any, that weight now sits in both pans of the balance.

This Court, and not Congress, expanded the scope of habeas review to nonjurisdictional questions of procedure. See *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 437, 113 S. Ct. 1745, 1768 (1993) (Scalia, J., dissenting). This Court, and not Congress, created a host of nonfundamental constitutional issues without stopping to consider whether habeas ought to lie for them as well. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). This Court, and not Congress, stripped the district courts of their *Salinger/Hawk* discretion to decline to reopen fully litigated questions, without any explanation for the change. See *ante*, at 10-13.

Thus, when a federal court of appeals overturns the unanimous judgment of three or four courts, both state and federal, and wrongly grants habeas relief to a properly convicted felon, this Court bears a special responsibility to correct that injustice. Yet glaring errors by the courts of appeals occur with distressing frequency, and this Court cannot correct them all. See, *e.g.*, *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988) (en banc), cert. denied *sub nom.* *Lewis* v. *Adamson*, 497 U. S. 1031 (1990) (hired assassin for organized crime, decision contrary to *Walton* v. *Arizona*, 497 U. S. 639 (1990), *Lewis* v. *Jeffers*, 497 U. S. 764 (1990), and *Alabama* v. *Smith*, 490 U. S. 794 (1989)); *Beam* v. *Paskett*, 3 F. 3d 1301 (CA9 1993), cert. denied *sub nom.* *Arave* v.

Beam, O. T. 1993, No. 93-1380 (April 25, 1994) (misapplication of first *Teague* exception to sane adult convicted of rape and murder); *Hamilton* v. *Vasquez*, 17 F. 3d 1149 (CA9 1994), cert. denied *sub nom. Calderon* v. *Hamilton*, O. T. 1993, No. 93-1652 (June 20, 1994) (habeas granted based on instruction more favorable to defendant than the one upheld in *California* v. *Ramos*, 463 U. S. 992 (1983)).

At the present time, federal habeas corpus may well be causing more injustices than it cures. Restoring *Salinger/Hawk* discretion to the district courts would be a substantial step toward fixing that problem. The discretion would rarely be exercised to shield a clearly wrong state decision, and such an exercise would be reversible as an abuse of discretion. On the other hand, a district court's exercise of that discretion would shield a correct and carefully considered state decision from invalidation by a court of appeals which erroneously disagrees with it, but cannot say it was unquestionably wrong. The number of wrongful grants calling for this Court's intervention would be reduced.

The discretionary compromise outlined above has the potential to heal the fracture left by *Wright* v. *West*. *Amicus* respectfully submits that the Court should grant certiorari to entertain full briefing and argument on this important question. Should the Court decide to restore the rule of *Salinger* and *Hawk*, the present case would easily pass muster as one where the district judge could decline to reopen the question determined by the state courts, and the case could be remanded to the District Court for exercise of that discretion.

CONCLUSION

The writ of certiorari should be granted.

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Respectfully submitted,

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